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No. 92-1819

IN THE

Supreme Court of the United States

October Term, 1992

LOUIS EDMONDS, a minor by TANEIKA JAMES, mother and natural guardian, and TANEIKA JAMES, in her own right,

Petitioners,

vs.

THE WESTERN PENNSYLVANIA HOSPITAL, RADIOLOGY ASSOCIATES OF WESTERN PENNSYLVANIA, P.C., NEAL B. SIMMONS, M.D. and HARVEY L. NEIMAN, M.D.,

Respondents.

—0—

LOUIS EDMONDS, a minor by TANEIKA JAMES, mother and natural guardian, and TANEIKA JAMES, in her own right,

Petitioners,

vs.

WYNNE COOPER, M.D.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

BRIEF OF RESPONDENT WYNNE COOPER, M.D., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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THE WESTERN PENNSYLVANIA HOSPITAL, RADIOLOGY ASSOCIATES OF WESTERN PENNSYLVANIA, P.C., NEAL B. SIMMONS, M.D. and HARVEY L. NEIMAN, M.D.,

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BRIEF OF RESPONDENT WYNNE COOPER, M.D., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

Petitioners in the instant action are a mother and her natural child who together brought two separate lawsuits alleging negligence and seeking damages for wrongful brith in the Court of Common Pleas of Allegheny County, Pennsylvania. The first suit was filed in 1989 against Wynne Cooper, M.D., the obstetrician of the mother, alleging negligence for failing to communicate the results of a sonogram performed on the mother. See Respondent's Appendix (hereinafter cited as "RA"). The second suit was brought by petitioners against The Western Pennsylvania Hospital, Radiology Associates of Western Pennsylvania, P.C., Neil B. Simmons, M.D., and Harvey L. Neiman, M.D. again alleging negligence in seeking damages for failing to communicate results of a sonogram.

Petitioner Taneika James (hereinafter "Ms. James") alleged that on or about June 8, 1988, she first learned she was pregnant. (RA2). On or about October 10, 1988, Ms. James was examined by Dr. Cooper. (RA3). Ms. James alleged that the sonogram revealed fetal abnormalities. (RA3). That sonogram estimated the gestation age of the unborn child was 25.3 weeks with a range of 23.5 to 26.9 weeks. (RA3). On or about December 12, 1988, Ms. James was again examined by Dr. Cooper and a second sonogram was scheduled and thereafter performed on December 27, 1988. Ms. James alleged the second sonogram confirmed the fetal abnormality. (RA4). On or about December 29, 1988, Dr. Cooper referred Ms. James to a genetic clinic. (RA4). Ms. James alleged that on February 12, 1989, she delivered her son, Louis Edmonds, by Caesarean section. Ms. James further alleged that subsequent to her son's birth, it was confirmed that he suffered from quadrigeminal arachnoid cysts and hydrocephalus. (RA5).

In her suit against Dr. Cooper, Ms. James alleged both wrongful birth and wrongful life causes of action. Ms. James alleged that Dr. Cooper was negligent in not informing her of the child's potential injury in a timely manner, thus precluding her from terminating the pregnancy. Ms. James also asserted, on behalf of her son, Louis Edmonds, a claim for wrongful birth. Dr. Cooper moved for Judgment on the Pleadings on the basis that Pennsylvania has statutorily prohibited causes of action for both wrongful birth and wrongful life. 42 Pa.C.S.A. §8305.

At argument upon the Motion for Judgment on the Pleadings, Ms. James did not contest the propriety of an Order granting Judgment on the Pleadings as to the wrongful life cause of action. Additionally, Ms. James agreed that as to the wrongful birth claim, Section 8305 was applicable to bar the claim, arguing instead that Section 8305 was unconstitutional.

Ms. James appealed the granting of Dr. Cooper's Motion for Judgment on the Pleadings to the Superior Court of Pennsylvania. Ms. James also appealed an Order granting a demurrer to the Complaint filed by the other Respondents in this action. On March 13, 1991, all parties filed a stipulation to consolidate the appeals. The Superior Court of Pennsylvania, on or about April 30, 1992, affirmed the Orders of the lower court in the instant action and dismissed Petitioners' Complaint pursuant to 42 Pa.C.S.A. §8305(a). Petitioner filed a Petition for Allowance of Appeal with the Supreme Court of Pennsylvania on or about June 1, 1992. This Petition was denied by the Supreme Court of Pennsylvania, *per curiam*, on January 6, 1993. Petitioners then filed an application for reargument with the Supreme Court of Pennsylvania which was also denied, *per curiam*, on February 12, 1993. Petitioners then filed a Petition for a Writ of Certiorari with this Honorable Court.

REASONS FOR DENYING THE WRIT

Rule 10 of the Rules of the Supreme Court of the United States provides that: "[a] review on Writ of Certiorari is not a matter of right, but of judicial discretion. A petition for a Writ of Certiorari will be granted only when there are special and important reasons therefor." In the case *sub judice,* the Pennsylvania Supreme Court's decision, which affirmed that of the Superior Court of Pennsylvania, is clearly correct and in accordance with applicable decisions of this Court and of Federal Appellate Courts. Consequently, there are no special or important reasons for this Court to review the issues decided by the Courts below, and the grounds asserted by petitioners for the exercise of this Court's discretion are wholly without foundation or merit. A review of the arguments raised by petitioners, and a presentation of the reasons for the denial of the Writ, are presented separately for each issue below.

I. Pennsylvania's wrongful birth statute set forth in 42 Pa.C.S.A. §8305(a) does not deprive a woman of her constitutional rights to due process and equal protection under the 14th Amendment of the United States Constitution.

In *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed. 2d 147 (1973), this court held that a woman has a constitutionally protected right to choose whether or not to have an abortion in the first trimester of pregnancy. In order to be in violation of *Roe v. Wade,* a state must directly affect or impose a significant burden on a woman's right to an abortion. See *Maher v. Roe,* 432 U.S. 464, 97 S.Ct. 2376, 53 L.Ed. 2d 484 (1977).

In the instant case, petitioner Taneika James alleges that she would have chosen to have an abortion during the first trimester of her pregnancy if she had been informed of fetal abnormalities in a timely manner by respondents (doctors, a hospital and a professional corporation). Ms. James believes, therefore, that she should be permitted to bring an action against respondents seeking damages for the wrongful birth of her child. Pennsylvania's Wrongful Birth Statute at 42 Pa.C.S.A. §8305(a) prohibits actions for wrongful birth. Ms. James argues that this statute infringes upon her right to choose under *Roe v. Wade,* and therefore violates her due process and equal protection rights under the 14th Amendment.

To assert a violation of due process or equal protection under the constitution, a party must prove state action. *Shelly v. Kraemer,* 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948). Legislation which does not place a *government* obstacle in the path of a woman who chooses to terminate her pregnancy will not be deemed unconstitutional. *Harris v. McRae,* 448 U.S. 297, 315, 100 S.Ct. 2671, 2687, 65 L.Ed. 2d 784, 803 (1980).

In the present case the allegations of negligence of failing to timely communicate the results of the sonogram, thus allegedly preventing the mother from having an abortion are directed towards private individuals. Therefore, assuming *arguendo* that the allegations are correct, then the respondent doctors and respondent hospital, and not the state placed an alleged obstacle. If anyone arguably infringed on Ms. James' right to an abortion, it was the doctors and the hospital and not the state. "[A]lthough government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its

own creation." *Harris,* 448 U.S. at 316, 100 S.Ct. 2688, 65 L.Ed. 2d at 804. The state, therefore, has no obligation to remove such obstacle. *Id. See also Webster v. Reproductive Health Service,* 492 U.S. 490, 509, 109 S.Ct. 3040, 3052, 106 L.Ed. 2d 410, 430 (1989); *Maher,* 432 U.S. at 474.

Furthermore, as the Pennsylvania Superior Court acknowledged in the instant action, although the provisions of 42 Pa.C.S.A. §8305(a) clearly relieve physicians from liability for negligently failing to provide women with information affecting abortion decisions, it would be speculative to assume that such extinguishment of liability encourages improper behavior. (See Opinion of the Pennsylvania Superior Court dated April 30, 1992 and attached to Petitioners' Brief as Appendix D, p. 16a). *See also, Dansby v. Thomas Jefferson University Hospital,* 1993 W.L. 78740 (Pa. Super. 1993); *Edmonds v. Western Pennsylvania Hospital Radiology Associates,* 414 Pa. Super. 567, 607 A.2d 1083 (1992).

The Osteopathic Medical Practice Act, 63 P.S. §271.1 *et seq.,* and the Medical Practice Act of 1985, 63 P.S. §422.1 *et seq.,* respectively create the State Board of Osteopathic Medicine and the State Board of Medicine. In addition, they establish licensing procedures for various medical professionals, including physicians, and provide that licenses may be refused, revoked or suspended for certain enumerating reasons. *Edmonds,* 607 A.2d at 1087. According to the two acts, physicians may be disciplined by the appropriate boards for making intentional misrepresentations in connection with patient care. *See* 63 P.S. §§271.15(a)(2) and 422.41(2). Thus, if a physician intentionally misrepresented to a woman the

state of her health or that of her fetus in an effort to infringe upon her abortion rights, he could be disciplined by the appropriate licensing authority. *Id.*

Since 42 Pa.C.S.A. §8305(a) specifically indicates that it provides no defense to a disciplinary proceeding involving such misrepresentations, it clearly does not encourage physicians to make them. *Edmonds,* 607 A.2d at 1087. Nor can it be presumed that the act in any way encourages negligent behavior. All doubts relating to the constitutionality of a statutory provision must be resolved in its favor. *Id.* It must be presumed, therefore, that 42 Pa.C.S.A. §8305(a) does not encourage physicians to engage in the negligent conduct at issue. *Id.*

In *Hickman v. Group Health Plan, Inc.,* 396 N.W. 2d 10 (1986), Appellants like Ms. James in the instant case, argued that the State's failure to provide a remedy for money damages against a negligent doctor is an intrusion upon a woman's constitutional rights. *Hickman,* 396 N.W. 2d at 16. Minnesota has a wrongful birth statute substantially similar to 42 Pa.C.S.A. §8305(a). *Id.* at 12. In *Hickman,* the Plaintiffs brought suit alleging *inter alia,* that had they known that their minor child had downs syndrome prior to her birth, they would have chosen to have an abortion. *Hickman,* 396 N.W. 2d at 16. Defendants brought a motion for summary judgment on the basis of the Minnesota Wrongful Birth Statute. The District Court initially found the Minnesota statute unconstitutional under *Roe v. Wade, supra,* but the Supreme Court of Minnesota preserved the statute and upheld its constitutionality. In reaching their decision, the Minnesota Supreme Court held that the statute did not violate the due process and equal protection clauses of the 14th Amendment because there was no state action or state involvement. The Court stated:

> The relationship here is strictly between the doctor and patient. The statute does not forbid the doctor to inform the patient of new tests and risks they entail. It does not directly touch on the expectant mother's right to choose an abortion. Due process does not require that the state adopt regulations prohibiting purely private conduct.

Id. at 13, citing *Blum v. Yaretsky*, 457 U.S. 991, 102 S.Ct. 2777, 73-L.Ed. 2d 534 (1982).

Furthermore, the Court held that the statute did not violate the Supreme Court directive of *Roe v. Wade*. The Court found the statute did not directly affect or impose a significant burden on a woman's right to an abortion. *Hickman*, 396 N.W. 2d at 14.

Similarly, 42 Pa.C.S.A. §8305 does not interfere with a woman's right to have an abortion. A woman is free to have an abortion, notwithstanding this Act. The Act does not impose a restriction upon, or authorize action which impedes a woman's right to an abortion, nor does it impose procedures which unduly burden the exercise of that right. Instead, the statute by its language merely extinguishes all causes of action arising from a claim that but for the improper conduct of a medical provider, a child would have been aborted prior to birth.

The Pennsylvania Wrongful Birth Statute is clearly distinguishable from the Spousal Consent Statute in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed. 2d 788 (1976), cited by petitioner. In *Danforth*, this Court held that Missouri's requirement of spousal consent was unconstitutional because it granted a husband the right to prevent unilaterally, and for whatever reason, the effectuation of his wife's and her physician's decision to terminate her

pregnancy. *Danforth*, 428 U.S. at 69. Missouri, thus directly impaired by statute Plaintiff's right to decide whether or not to have an abortion.

Pennsylvania's Wrongful Birth Statute is clearly distinguishable where petitioner's freedom to decide is not impaired by a statute which denies her the right to bring an action against the physician who has negligently failed to advise her correctly regarding the health of the fetus. *See Hickman*, 396 N.W. 2d at 17. *See also Dansby v. Thomas Jefferson University Hospital*, 1993 W.L. 78740 (Pa. Super. 1993).

Petitioner's argument that Pennsylvania's Wrongful Birth Statute violates the Equal Protection Clause because it discriminates against women who choose to have an abortion must also fail. Such women do not constitute a suspect class. *San Antonio School District v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed. 2d 16 (1973). This Court in *San Antonio* held that a suspect class is one:

> [S]addled with such disabilities, or subjected to such history of purposeful and unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

Rodriguez, 411 U.S. at 28. Women who choose to have an abortion clearly do not constitute a "suspect class". *Id. See also, Maher*, 432 U.S. at 471.

Since 42 Pa.C.S.A. Section 8305 does not infringe upon a fundamental right or suspect class, it is not necessary for this state to have a compelling state interest in order to justify the statute. It is only necessary that the state have a rational basis in order for it not to violate the equal protection or the due process clauses of the

Fourteenth Amendment. *San Antonio School District v. Rodriguez,* 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed. 2d 16 (1973).

By enacting Section 8305, the Pennsylvania legislature was concerned with the elimination of suits brought by children or other parents to recover damages for the failure to abort a child. The act itself is quite clear in its prohibition against wrongful birth and wrongful life causes of action. The intent of this act was stated by Senator Rocks during a debate within the Senate:

> This is the intent of what the wrongful birth and wrongful life legislation is about to stop a court engendered policy which views the birth of a child, be that child handicapped or otherwise, as a damaging event for which someone should be punished in order to prevent this quality of life ethic from becoming so pervasive that a handicapped child is routinely considered better off dead and of less value than what we could call a "normal child" and to prevent the practice of medicine, especially obstetrics and gynecology, from becoming coerced into accepting eugenic abortion as a condition for avoiding what are particularly wrongful birth lawsuits.

1988 Pa. Legis. Serv. 1961 (Purdon).

Additionally, the legislature provided four very persuasive reasons to support this change. First, to permit these lawsuits is to admit that birth can be evil and a cause of action. The legislators did not believe that a birth should be an evil, and felt that if such an admission were allowed, our society, as we know it, would cease to protect the interests of those who may be far less fortunate than others. Second, the legislators felt that to permit these lawsuits was both illogical and inconsistent. Every year, there is an increased

recognition of the rights of the handicapped, those who are not "normal". These include accessibility to transportation, accessibility to buildings, mainstreaming and education. By permitting these lawsuits, we would in essence be saying that the handicapped are entitled to these rights, yet they have no right to life.

Third, the legislators should never dictate to a doctor how to practice medicine. The existence of such lawsuits was doing just that. They were requiring doctors, against their will and their conscience, to practice recommending abortions. According to the words of our legislature this was "outrageous". Fourth, from a pragmatic standpoint, it is the presence of these lawsuits which is one of the main factors that have caused medical malpractice rates for obstetricians to skyrocket. The legislature recognized that these suits had to be curtailed if we are to be able to maintain adequate health care in the Commonwealth. See 1988 Pa. Legis. Serv. 2306 (Purdon).

It is clear that Pennsylvania has adopted a policy of promoting life over abortion and that the failure to abort an unborn child should never constitute a wrong. *Roe v. Wade* implies no limitation on the authority of the State to make a value judgment favoring childbirth over abortion. *Maher,* 432 U.S. at 474. *See also Webster,* 492 U.S. at 410.

Pennsylvania's Wrongful Birth Statute is rationally related to the legitimate state interest in recognizing the value of human life. Therefore, 42 Pa.C.S.A. Section 8305 should not be considered unconstitutional and Ms. James' petition for Writ of Certiorari should be denied.

II. The constitutionality of laws prohibiting wrongful birth actions is clear despite different holdings on the issue by the United States Circuit Court of Appeals for the 7th and 11th Circuits.

In *Robak v. United States,* 658 F.2d 471 (7th Cir. 1981), and *Campbell v. United States,* 962 F.2d 1579 (11th Cir. 1992), the United States Courts of Appeals for the 7th and 11th Circuits respectively, arrived at different holdings as to the question of whether a wrongful birth action is maintainable. In *Robak,* the 7th Circuit Court of Appeals held that an action for wrongful birth could be brought against a physician who failed to diagnose wife-Plaintiff's rubella, and failed to inform her of the potential danger to her fetus. Wife-Plaintiff alleged that she would have chosen to abort if she had been informed of such danger. *Robak,* 658 F.2d at 473.

In *Campbell,* the Court of Appeals for the 11th Circuit held that a wrongful birth action could not be brought against wife-Plaintiff's treating physician for failing to timely diagnose her pregnancy and administer an amniocentesis exam. Wife-Plaintiff alleged that if the diagnosis and exam were timely made, she would have learned of the genetic defect in her fetus before the end of the second trimester and would have terminated her pregnancy. *Campbell,* 962 F.2d 1581.

Petitioners argue that these different holdings by the Federal Appellate Courts in *Robak* and *Campbell,* leave an open question as to the constitutionality of wrongful birth statutes. An analysis of the *Robak* and *Campbell* cases demonstrates, however, that while the Federal Appellate Courts have arrived at different holdings as to the issue of the maintainability of wrongful birth actions, they do not conflict as to the issue of whether or not prohibition of such actions is constitutional. Indeed,

Robak did not even address the question of whether or not prohibition of wrongful birth actions violates a woman's constitutional rights under the 14th Amendment. *See Robak,* 658 F.2d at 471.

Both *Robak* and *Campbell* did, however, address the question of whether birth action could be maintained against the United States where the allegedly negligent medical providers in each case, worked for the government. To answer this question, the Federal Circuit Courts in *Robak* and *Campbell* were required under the Federal Tort Claims Act ("FTCA"), to apply the law of the state where the alleged tort occurred. *See Robak,* 658 F.2d at 474; *Campbell,* 962 F.2d at 1581.[1]

The conflicting holdings of *Robak* and *Campbell,* therefore, arose not because of a conflict in federal law, but rather due to a conflict in the respective state law applied in each case. The FTCA required that in determining whether a cause of action existed for wrongful birth in each case, it was necessary to apply the law that existed at the time and place (state) of the tort. *Id.* The Federal Appellate Courts in *Robak,* and *Campbell,* therefore, acted in harmony where they applied the proper respective state laws as required under the FTCA.

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[1] In *Robak,* because the alleged tort occurred in Alabama, the 7th Circuit looked to the law of that state. Because Alabama had never addressed the issue of an action for wrongful birth, the Court of Appeals turned to the law in Texas and Wisconsin, Alabama's sister states. Because these states permitted actions for wrongful birth, the 7th Circuit concluded that the law of the State of Alabama would also permit such an action. *Robak,* 658 F.2d at 474. In the absence of any direct precedent from the state involved, a Federal Court applying state law should consider decisions of its sister states on the same issue. *Id.* at 474.

This Court in *Martinez v. California*, 444 U.S. 277, 100 S.Ct. 553, 62 L.Ed. 2d 481 (1980), held that a state's interest in fashioning its own rules of tort law is paramount to any discernible federal interest. *Martinez*, 444 U.S. at 282. The constitution does not create a fundamental right to pursue specific tort actions. States may create immunities which effectively eliminate causes of action, subject only to the requirement that their action not be arbitrary or irrational. *Edelstein v. Wilentz*, 812 F.2d 128 (3d Cir. 1987). *See also Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432-33, 102 S.Ct. 1148, 1155-56, 71 L.Ed. 2d 265 (1982). Petitioners concede in their brief before this Court that state legislatures enjoy wide latitude in regulating tort actions. (Petitioners' Brief, p. 8).

As discussed in Section I, *supra*, the Pennsylvania legislature had a legitimate interest in providing immunity from tortious liability to medical providers under its wrongful birth statute. This statute clearly does not violate the equal protection and due process clauses of the 14th Amendment where it does not entail state action which regulates or interferes with a woman's right to choose an abortion.[2]

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[2] As noted, *Robak* did not even address the question of whether prohibiting a wrongful birth action violates a woman's constitutional rights under the 14th Amendment. *Campbell*, however did address this question and arrived at the same conclusion as the Pennsylvania Superior Court in the instant case, holding that the wrongful birth statute does not violate equal protection and due process rights where it does not involve state action infringing upon a woman's right to obtain an abortion. *Campbell*, 962 F.2d at 1582-1583.

Finally, the different holdings of the Federal Courts in *Robak* and *Campbell* do not weaken this constitutionality, where the Court of Appeals for the 7th and 11th Circuits respectively, merely applied the appropriate state law as required under the FTCA in each case. Petitioners' Writ of Certiorari requesting this court to clarify the allegedly "conflicting" federal opinions of *Robak* and *Campbell*, should therefore be denied, where no true conflict exists.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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RESPONDENT'S APPENDIX

Certified copy of Complaint filed by Petitioners against Respondent Wynne Cooper, M.D. in the Court of Common Pleas of Allegheny County, Pennsylvania

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

CIVIL DIVISION

No. GD 89-18962

LOUIS EDMONDS, a minor by TANEIKA JAMES, mother and natural guardian, and
TANEIKA JAMES, in her own right,

Plaintiffs,

vs.

WYNNE COOPER, M.D.,

Defendant.

Code: 007

Filed on behalf of: Plaintiffs.

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ALLEGHENY COUNTY

COMPLAINT IN CIVIL ACTION

1. At all times material, plaintiff, Louis Edmonds (plaintiff-child) was and is an individual, infant, male child, born to his mother, Taneika James and is presently residing with plaintiff-mother in Pittsburgh, Allegheny County in the Commonwealth of Pennsylvania.

2. At all times material, plaintiff-mother, Taneika James, was and is an individual residing in Pittsburgh, Allegheny County in the Commonwealth of Pennsylvania.

3. At all times material, defendant, Wynne Cooper, M.D. (Physician) was and is an individual physician licensed to practice medicine within the Commonwealth of Pennsylvania with her principal office at 7525 Forward Avenue, Pittsburgh, Allegheny County, Pennsylvania. Plaintiff believes and avers that defendant physician also operates out of the Alma Illery Clinic in Wilkinsburg. Defendant Physician, at all times, held herself out to plaintiff-mother as skilled and confident in the fields of obstetrics and gynecology.

4. Plaintiff-mother believes and avers that on or about June 8, 1988, she learned for the first time that she was pregnant. Plaintiff-mother was examined and followed by a certain physician or physicians who ordered the performance of a sonogram.

5. Plaintiff-mother believes and avers that an initial sonar or sonogram was performed on or about August 17, 1988. Based on the sonogram, the duration of plaintiff-mother's pregnancy was approximated at 16 weeks with an estimated date of confinement of February 5, 1989. Plaintiff-mother avers that the findings of this sonogram were essentially normal with no evidence of fetal abnormality.

6. Plaintiff-mother believes and avers that on or about October 10, 1988, plaintiff-mother was examined by defendant-Physician, wherein the defendant became plaintiff-mother's physician by choice. Plaintiff-mother believes and avers that the Physician desired the performance of a repeat sonogram and that defendant's Pre-Natal Flow Record indicates that a sonogram was to be scheduled.

7. On or about October 25, 1988, a second sonogram was performed upon plaintiff-mother. Plaintiff-mother had no reason to believe that the sonogram performed on October 25, 1988 differed from the sonogram taken in August, 1988 and at all times, plaintiff-mother believed that the sonogram showed the normal development of her child.

8. Plaintiff-mother believes and avers that she asked the Physician of the results of the sonogram and she was informed that the sonogram was normal. Plaintiff-mother believes and avers that defendant-Physician was not provided with the results of the October 25, 1988 sonogram and then later either forgot to request a report or forgot that the test had even been performed. As such, plaintiff-mother did not know or have reason to know of any fetal abnormality in October or November, 1988.

9. Plaintiff-mother believes and avers that the findings or results of the October 25, 1988 sonogram did in fact show a fetal abnormality. Plaintiff-mother avers that a high quality comprehensive study was performed on October 25, 1988 which demonstrated a cystic structure (porencephalic cyst) in the region of the hippocampus of plaintiff-child, which measured 1.9 x 2.1 x an uncertain height. At the time of the sonogram, plaintiff-child's compatible gestation age was 25.3 weeks with a range of 23.5 to 26.9 weeks.

10. On or about December 12, 1988, plaintiff-mother was again examined by defendant-Physician and a sonogram was scheduled for December 27, 1988 at West Penn Hospital. A sonogram was performed on December 27, 1988 which confirmed the presence of a porencephalic cyst, but enlarged since the previous sonogram.

11. Plaintiff-mother believes and avers that during the sonogram of December 27, 1988, two technicians or agents, servants or employees of the hospital indicated that they had observed something concerning the baby's brain. Plaintiff-mother requested additional information from the technicians, however, plaintiff-mother was told to discuss and review the results with her physician.

12. Plaintiff-mother avers that she attempted to discuss the sonogram with defendant at the next appointment on December 29, 1988 and requested that defendant determine whether or not the test was normal. It was at this time that plaintiff-mother was informed of the presence of a cyst on her child's head or brain and that she had not been informed of the presence of said cyst until her appointment with defendant-Physician on or about December 29, 1988. Plaintiff-mother was then referred to a genetic clinic for evaluation.

13. Plaintiff-mother believes and avers that defendant-Physician desired to schedule an amniocentesis for two weeks from December 27, 1988. However, plaintiff-mother's mother insisted upon an immediate amniocentesis and as such, one was performed on January 3, 1989.

14. Plaintiff-mother believes and avers as a result of the performance of the amniocentesis on January 3, 1989, plaintiff-mother was subjected to premature labor for approximately six hours wherein plaintiff-mother was

given medication to prevent the delivery of her child and cease contractions. Plaintiff-mother avers that she was not given any medications to reduce the pain and suffering she experienced while in premature labor on January 3, 1989.

15. Plaintiff-mother believes and avers that a second amniocentesis was performed on or about January 16, 1989, along with other diagnostic testing, due to the fact that the prior amniocentesis performed on January 3, 1989 was not accurate for diagnostic purposes. As such, plaintiff-mother was again subjected to an amniocentesis on January 16, 1989.

16. As a result of the amniocentesis or other diagnostic testing performed on January 16, 1989, plaintiff-mother was again subjected to the pain and suffering accompanying premature labor for an approximate eight hour period of time. Again, no medications to reduce the pain and suffering experienced in the premature labor were given to plaintiff-mother and medications were given to plaintiff-mother again to terminate the contractions and stop the labor or delivery of the child.

17. On or about February 12, 1989, plaintiff-mother went into labor and at approximately 10:00 p.m. required an epidural and the reactivation of the epidural three times. However, due to complications with the labor, plaintiff-child was delivered through Cesarean-Section. Subsequent to plaintiff-child's birth it was determined or diagnosed that plaintiff-child suffered from quadrageminal arachnoid cysts as well as hydrocephalus.

18. Plaintiff-mother believes and avers that a ventriculoperitoneal shunt was placed due to the enlarged ventricles of plaintiff-child. On or about March 17, 1989,

further surgical procedures needed to be performed wherein a left-sided quadrigeminal cistern arachnoid cyst to peritoneal shunt was inserted. Plaintiff-child was discharged on March 19, 1989.

19. Plaintiff-child has been subjected to additional surgical procedures, including but not limited to a procedure performed on April 14, 1989 wherein a new left sided VP shunt was placed by a physician. Plaintiff-mother believes and avers that further shunt revision or the placement of additional shunts have been performed since April, 1989 and continued periodic treatment and examination of plaintiff-child is required to continually rule out the possibility of infection. Plaintiff-mother believes and avers that additional surgical or other medical procedures or shunt revisions will be required throughout plaintiff-child's life with the associated everyday concern as to whether or not infection will set into plaintiff's child's brain or body.

20. As a direct and proximate result of the conduct of defendant as referred to above and the negligence particulars set forth below, plaintiff-mother sustained the following injuries and damages, all of which may be continuing in nature and character:

a. Plaintiff-mother has been subjected to much emotional pain, suffering, inconvenience, anxiety, distress, depression and confusion;

b. She was forced to give birth to a child who would require extensive medical care throughout the child's life;

c. She was subjected to the physical and emotional pain, suffering, inconvenience and distress associated with at least two premature labor incidents, as well as associated with the labor and delivery of her child;

d. Plaintiff-mother was subjected to an unnecessary surgical procedure with associated risks and complications in the delivery of her child;

e. Plaintiff-mother was not given her rightful choice as to whether or not to terminate the pregnancy;

f. Plaintiff-mother had to completely alter her lifestyle due to the birth of said child and the extensive medical care and treatment required and which will be required.

g. Plaintiff-mother must live, day by day, with the reality and fear that her child's life expectancy is guarded;

h. Plaintiff-mother has lost the ability to enjoy a normal lifestyle with her child and has been and will be required to expend sums of money for past, present and future medical care for the child.

i. Plaintiff-mother has lost the ability to go about and enjoy her normal lifestyle subsequent to the birth of her child and will be unable to pursue the future development of her lifestyle, or such further development of it may be delayed.

21. As a direct and proximate result of the conduct of defendant as referred to above and the negligent particulars set forth below, plaintiff-child sustained the following injuries and damages, all of which may be continuing in nature and character:

a. Plaintiff-child has been subjected to much emotional and physical pain, suffering, inconvenience, anxiety and distress;

b. Plaintiff-child was subjected to premature labor on two separate occasions while in plaintiff-mother's womb, which created additional physical pain, suffering, inconvenience and distress;

c. Plaintiff-child was carried full term and was delivered on or about February 13, 1989 with severe fetal abnormalities and complications;

d. Plaintiff-child was subjected to many necessary surgical procedures with associated risks and complications subsequent to the delivery of plaintiff-child which include, but is not limited to the placement of shunts in his brain;

e. Plaintiff-child will in the future be subjected to the risks and complications associated with the surgery required to treat the condition from which he suffers and the replacement of shunts periodically through the remainder of his life;

f. Plaintiff-child has been and will be subjected to the risks and complications of infection, seizures and other disabilities which may cause him future injuries and damages and death;

g. Plaintiff-child has lost and will never gain the ability to enjoy a normal lifestyle and he will be required to expend or his guardian will be required to expend sums of money for past, present and future medical care required for plaintiff-child;

h. Further surgical procedures will be required upon plaintiff-child with associated physical and emotional pain, suffering, inconvenience, distress, anxiety, embarrassment and humiliation;

i. Plaintiff-child has sustained a loss of life expectancy and a loss of potential earning capacity.

COUNT I—TORT
TANEIKA JAMES V. WYNNE COOPER, M.D.

22. The allegations set forth in paragraphs 1 through 21 above are hereby incorporated by reference into Count I of this Complaint as though the same were to be repeated at length herein.

23. At all times material, defendant-Physician had a duty of care to plaintiff-mother and to the fetus within her, which entailed the following:

a. To verify the sonogram of October 25, 1989 had been performed;

b. To request a copy of the report of the findings of the sonogram taken October 25, 1988;

c. To determine whether a report had been sent by the hospital or received by any of defendant's offices;

d. To use all available means to determine the results of the October 25, 1988 sonogram;

e. To inform plaintiff-mother of the results of the October 25, 1988 sonogram in a timely manner; and

f. To provide accurate information to plaintiff-mother on the condition of her unborn child to enable plaintiff-mother to make informed decisions on all possible alternatives.

24. Defendant breached all of the above-mentioned duties of care to plaintiff-mother, and defendant's conduct, actions or omissions were negligent and careless in the following particulars:

a. In failing to inform plaintiff-mother of the findings of the October 25, 1988 sonogram;

b. In failing to request a report from the hospital which performed the October 25, 1988 sonogram;

c. In forgetting that defendant had ordered the sonogram for October 25, 1988 and thereby forgetting that a report existed;

d. In failing to check with the hospital which performed the sonogram for the results of the sonogram;

e. In failing to discuss in a timely manner with plaintiff-mother the results, alternatives, risks and complications associated with the results of the October 25, 1988 sonogram;

f. In failing to determine whether or not a report had been sent by the hospital or received by any of the offices in which defendant practices out of;

g. In failing to use all available means to learn in timely manner the results of the October 25, 1988 sonogram;

h. In otherwise failing to exercise that degree of care due and owing to plaintiff-mother under the circumstances;

i. By informing plaintiff-mother that the results of the October 25, 1988 sonogram were normal;

j. In the alternative, if defendant had received in a timely manner, the report of the October 25, 1988 sonogram, then in failing to permit plaintiff-mother ample opportunity or time to determine whether to abort or terminate the pregnancy upon receiving information on the fetal abnormality;

k. In knowing or having reason to know that plaintiff-mother's child had a fetal abnormality and in failing to inform plaintiff-mother immediately.

25. As a direct and proximate result of the negligent or careless conduct of defendant as set forth above, plaintiff-mother has sustained those injuries and damages set forth in paragraphs 14, 15, 16, 17 and 20 above.

WHEREFORE, plaintiff-mother hereby demands judgment in her favor and against the defendant in an amount in excess of $20,000.00 and in an amount in excess of the jurisdiction of the Arbitration Division of the Court, plus costs.

COUNT II—TORT
LOUIS EDMONDS V. WYNNE COOPER, M.D.

26. The allegations set forth in paragraphs 1 through 25 above are hereby incorporated by reference into Count II of this Complaint.

27. At all times material, defendant had the duty of care to the plaintiff-child wherein said duty of care is set forth in paragraph 23 above.

28. Defendant breached all of the above-mentioned duties of care to plaintiff-child and defendant's conduct, actions or omissions were careless in the particulars which are set forth in Count I of the Complaint.

29. As a direct and proximate result of the negligence or carelessness of the defendant, plaintiff-child has sustained those injuries and damages as set forth in paragraphs 18, 19 and 21 above.

WHEREFORE, plaintiff-child hereby demands judgment in her favor and against the defendant in an amount in excess of $20,000.00 and in an amount in excess of the jurisdiction of the Arbitration Division of the Court, plus costs.

Respectfully submitted,

MARK B. ARONSON
Mark B. Aronson

BRUCE S. GELMAN
Bruce S. Gelman

§4904. Unsworn falsification to authorities

(a) **In general.**—A person commits a misdemeanor of the second degree if, with intent to mislead a public servant in performing his official function, he:

(1) makes any written false statement which he does not believe to be true;

(2) submits or invites reliance on any writing which he knows to be forged, altered or otherwise lacking in authenticity; or

(3) submits or invites reliance on any sample, specimen, map, boundary mark, or other object which he knows to be false.

(b) **Statements "under penalty."**—A person commits a misdemeanor of the third degree if he makes a written false statement which he does not believe to be true, on or pursuant to a form bearing notice, authorized by law, to the effect that false statements made therein are punishable.

(c) **Perjury provisions applicable.**—Section 4902(c) through (f) of this title (relating to perjury) applies to this section.

1972, Dec. 6, P.L. _____, No. 334, §1, eff. June 6, 1973.

VERIFICATION

Now comes Taneika James, plaintiff-mother in the civil action at which the foregoing document is intended to be filed of public record, who verifies that the facts set forth in the foregoing Complaint in Civil Action are true and correct to the best of his/her knowledge, information and belief. This verification is made subject to the penalties of 18 Pa. C. S. §4904, relating to unsworn falsification to authorities, which provides for criminal penalties if a person with intent to mislead makes a written false statement which he/she does not believe to be true.

Date: April 13, 1990 TANEIKA JAMES

Filed: Apr 17, 1990, 9:31 PM

(SEAL(
CERTIFIED FROM THE RECORD
MICHAEL T. COPRA
Prothonotary

MARTHA CLOUER
Deputy